

EXHIBIT U

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Diversi-Plast Products, Inc.,)	REBUTTAL REPORT OF
a Minnesota corporation,)	STEVE CARPENTER
)	REGARDING THE VALIDITY
Plaintiff,)	OF U.S. PATENT NO. 6,357,193
)	
vs.)	
)	Civil Action No: 2:04-CV-01005 PGC
Battens Plus, Inc.,)	Judge: Paul G. Cassell
a California corporation,)	
)	
Defendant.)	

I, Steve Carpenter, have been retained by the law firm of Patterson, Thuente, Skaar & Christensen, P.A., counsel for Plaintiff Diversi-Plast Products, Inc., as an expert witness to render the following rebuttal opinion, pursuant to Federal Rule of Civil Procedure 26, concerning the expert report submitted by Defendant Battens Plus, Inc. regarding the validity of U.S. Patent No. 6,357,193 ("the '193 Patent").

I. QUALIFICATIONS

I am the project manager and estimator for S. Kramer Roofing, Inc. in Denver, Colorado. S. Kramer Roofing, Inc. does residential and commercial roofing, including asphalt shingle, and clay and concrete tile work. I have attached a copy of my professional resume as Appendix A, which further demonstrates my qualifications. I have not authored any publications in the past 10 years.

II. PRIOR TESTIMONY

I have not testified as an expert witness at trial or by deposition in the last four years.

III. COMPENSATION

I am being compensated at an hourly rate of \$100 for my activities in connection with this matter, and an hourly rate of \$200 for all time spent testifying, whether in court or in a deposition. In addition, I am being reimbursed for reasonable expenses incurred as a result of my activities as an expert witness. My compensation is not contingent on my opinions offered in this matter or the outcome of this case.

IV. INFORMATION AND MATERIALS CONSIDERED

For purposes of my opinion I have considered the information and materials listed in Appendix B, and the information and materials listed in my January 16, 2006 initial Export Report On Infringement.

V. STATEMENT OF OPINIONS

I offer the following rebuttal opinion on the validity of the '193 Patent based on my examination of the materials and information provided below in Section IV. I reserve the right to supplement my opinions and analysis upon the issuance by the Court of an order construing the asserted claims of the '193 Patent as well as any further developments in the reissue/reexam prosecution of the '193 Patent.

I have been instructed by Diversi-Plast's attorneys that under U.S. Patent Law in order for a claim of a patent to be invalid as anticipated, each and every element of the claim must be

found in a single prior art reference. I have also been instructed that in order for a claim to be invalid as obvious, there must be a motivation or suggestion in the prior art for a person of ordinary skill in the art to combine two or more references in such a way that the combination of those references includes each and every limitation set forth in the claim. In addition, I was instructed that under the law a dependent patent claim also includes all of the limitations of the independent claim it depends from. As a result, I will assume that claim 2 includes all of the limitations of claim 1 as well.

Based on these instructions, my close review of the '193 Patent in light of my practical understanding and experience with roof battens and tile roofing systems, and the Opening Expert Report of Philip D. Dregger Concerning U.S. Patent 6,357,193 B1, it is my opinion that the '193 Patent is valid and that Mr. Dregger's report does not demonstrate that the '193 Patent is invalid as being anticipated or as being obvious.

I reviewed the following claims in providing this rebuttal report on the validity of the '193 Patent.

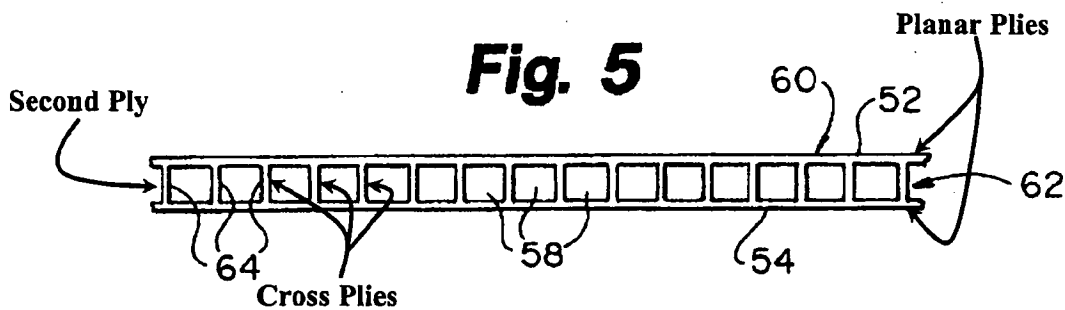
1. A tile roof system, comprising:
 - an overlayment;
 - a tile; and
 - a batten disposable between the tile and the overlayment, the batten comprising:
 - at least one layer comprising a generally planar first ply and a second ply, the first and second plies cooperating to define a multiplicity of passages extending generally transversely to a longitudinal axis of the batten.
2. The batten of claim 1, in which the second ply includes a multiplicity of cross plies extending between the first plies.

Claim Construction

First, Mr. Dregger's report mistakenly concludes that the terms "ply," "plies," "cross-plies," "second ply," and "first plies" are not defined by the '193 Patent. Mr. Dregger's report

then goes on to incorrectly define “ply” as “a layer of material with a planar surface.” Not only does the ‘193 Patent provide a definition for the term “ply” and its various uses in claim 2, but Mr. Dregger’s suggested definition does not make sense in light of claim 2 or the rest of the ‘193 Patent.

Figure 5 and Column 3, Lines 18-24 of the ‘193 Patent clearly define the various plies as discrete sections of the batten. Column 3, Lines 19-20 state that the layer (60) includes planar plies (52) and (54) and a second ply (62), and that the second ply (62) includes a multiplicity of cross-pplies (64) that extend generally perpendicular (or transverse) between planar plies (52) and (54). This text in combination with Figure 5 (shown below) clearly defines the plies of claim 2 of the ‘193 Patent.



Mr. Dregger’s definition of a “ply” as “a layer of material with a planar surface” is incorrect. Mr. Dregger’s definition does not make sense in view of claim 2 and Figure 5. For example, the second ply (62) is clearly shown as not simply being a “planar surface,” but as a section of the batten having a series of distinct and transverse cross-pplies (64). It seems that by Mr. Dregger’s definition, a simple piece of writing paper would have two plies; one ply being the top planar surface of the paper and the second ply being the bottom planar surface of the paper. In fact, anything with a “planar surface” would be a “ply” according to Mr. Dregger’s definition. That definition does not make sense and ignores the definitions and disclosure in the ‘193 Patent.

Someone with practical understanding and experience with tile roofing systems will understand these terms after looking at the '193 Patent and the terms do not require any special meaning.

Anticipation

Mr. Dregger's report incorrectly concludes that claim 2 of the '193 Patent is anticipated by UK Patent GB2062056 to Neumann ("the Neumann Patent") because the Neumann Patent does not disclose generally planar first plies or a second ply including a multiplicity of cross plies extending between the first plies to define a multiplicity of passages.

None of the laths shown in the figures of the Neumann Patent disclose generally planar first plies as used in claim 2 of the '193 Patent, and demonstrated above from the figures and specification of the '193 Patent. In addition, claim 2 requires a multiplicity of cross plies "extending between the first plies." None of the figures of the Neumann Patent disclose multiple first plies with cross plies extending between them to define a multiplicity of passages. The Neumann Patent only shows different configurations of a piece of block-like lath with holes milled or formed in it, and does not show discrete plies, such as the first, second, and cross plies of claim 2 and the figures and specification of the '193 Patent.

Mr. Dregger also argues that the baseplate identified by number 2 in Figure 6 of the Neumann Patent is a first ply. First of all, the baseplate is separate from the block lath and cannot be one of the plies of the lath. Even if Mr. Dregger considers the baseplate to be one of the first plies, the baseplate is disclosed as being used with the block laths of Figures 1 and 2 of the Neumann Patent, which do not have outer first plies cooperating with a distinct second ply and cross plies to form passages.

Mr. Dregger also incorrectly claims that the specification of the Neumann Patent discloses a second ply having a multiplicity of cross plies extending between first plies to define a

multiplicity of passages. He cites page 2, lines 56-63 as disclosing "a second ply, in the form of a series of cross plies." However, that part of the Neumann Patent describes fixing short strips of lath at intervals to another lath with gaps between the strips to obtain the block lath structure shown in Figure 1. As explained above, the block lath of Figure 1 does not show distinct cross plies extending between distinct first outer plies to form the passages.

It is my opinion that none of the figures or the specification of the Neumann Patent disclose distinct planar first plies, or a second ply including a multiplicity of distinct cross plies extending between the first plies to define a multiplicity of passages, as required by claim 2 of the '193 Patent. The Neumann Patent does not anticipate the '193 Patent.

Obviousness

Mr. Dregger's report mistakenly concludes that claim 2 of the '193 Patent is obvious in light of the Neumann Patent in combination with products from Cor-A-Vent, Inc. Neither of these references provides a motivation to combine the two to obtain each of the elements of claim 2.

First of all, Mr. Dregger admits that the Cor-A-Vent products "are not necessarily promoted for use as a roof batten." The reason for this, as known to those skilled in the art of tile roofing, is that the Cor-A-Vent products do not have the structural, strength, or rigidity requirements of a tile batten needed to support roof tiles. Ridge and strip vents are only used for venting air and not for tile support and drainage.

Next, Mr. Dregger attempts to find similarities in using the lath of the Neumann Patent with Cor-A-Vent products just because both are used on some part of a roof. Mr. Dregger begins his report by stating that he was instructed not to use hindsight to combine references without some motivation. However, his report fails to provide any support from the Neumann Patent or

the Cor-A-Vent products that provides a motivation to combine the two. Mr. Dregger's repeated statement that "a person would be motivated to combine" the two references is nothing more than the improper hindsight he was instructed not to use. Based upon my review of the Neumann Patent and the Cor-A-Vent products, I do not believe either provides any motivation to one of ordinary skill in the art to combine the two references. In fact, it is clear that there is no motivation since the strip vent products have been around for years, but have not been used as tile battens by those experienced with roof tiling systems for the reasons I have already stated. Any attempt by Mr. Dregger to find motivation to combine the references comes from improper hindsight, only after learning of and applying the invention of the '193 Patent.

Mr. Dregger's report provides a short paragraph stating that a person of ordinary skill in the art would be motivated to combine U.S. Patent No. 5,471,807 ("the '807 Patent") to Vasquez or U.S. Patent No. 5,304,095 to Morris ("the '095 Patent") with Cor-A-Vent products or with the Neumann Patent "to achieve the venting and draining batten invention of claim 2 of the '193 Patent." This conclusion also uses improper hindsight as Mr. Dregger does not explain the motivation to combine any of the references. I have reviewed both the '807 Patent and the '095 Patent and neither provides a motivation to combine them with Cor-A-Vent products or the Neumann Patent. Furthermore, Mr. Dregger's report fails to identify the elements of the claims found in these references. Therefore, I do not believe these patents, in any combination with Cor-A-Vent products or the Neumann Patent render claim 2 of the '193 Patent obvious.

It is my opinion that neither the Neumann Patent nor the Cor-A-Vent products provide a motivation to combine the two to show the elements of claim 2 of the '193 Patent. Therefore I do not believe that claim 2 of the '193 Patent is obvious in view of the Neumann Patent with the Cor-A-Vent products.

VI. CONCLUSION

Based on the reasoning provided in section V of this report, it is my opinion that the expert report of Philip D. Dregger incorrectly defines the term "ply" as it is used in the specification and claims of the '193 Patent. It is also my opinion that Mr. Dregger's report fails to demonstrate that claim 2 of the '193 Patent is invalid, as anticipated or obvious.

VII. EXHIBITS

I may use exhibits at trial or other hearings, including (1) portions of the '193 patent, (2) portions of this report, (3) portions of the Opening Report of Philip D. Dregger Concerning U.S. Patent 6,357,193 B1 (3) portions of the materials identified in the text and Appendices of Mr. Dregger's report, (4) sample batten products, (5) portions of Mr. Dregger's reply to this report, if any, and (6) exhibits as an aid to the Court in presenting my opinion.

In preparing this report I relied on the information and materials currently available to me. I reserve the right to continue my investigation and to supplement or modify my opinion based on documents and information that has not yet been produced or is not yet available, and based on any relevant information from or actions taken during the reexam/reissue proceeding for the '193 Patent currently pending with the U.S. Patent Office. I understand that I may be asked to give further opinions in response to any future opinions expressed by Defendant's experts.

Respectfully submitted,

Dated: February 13, 2006

By:


Steve Carpenter
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Arvada, CO 80005

APPENDIX A

PROFESSIONAL RESUME OF STEVE CARPENTER

Steve Carpenter

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Arvada, Co 80005

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Srctmmotorsports@msn.com

Experience: 1999-Present **S. Kramer Roofing, Inc.** Denver, Co

Project Manager/ Estimator

My responsibilities for this position included

- Customer relations, sales, development of new product usage, ordering product for jobs, scheduling projects.
- Meeting with customers to help them make important decisions such as colors, materials best to use, giving information such as time to complete roof, warranty information, meeting with realtors for home sales, and meeting with insurance adjusters to get roof work approved. Over all making the customer comfortable with the process of getting a new roof.
- Specialized products are APP Modified Bitumen Membrane (Torch Down), Tile, Flow-Thru tile battens, Lamerite Slate, All Tamco products, all Certainteed products, All GAF Products, and many more.

1999-1998 **Cobb Brothers Racing** Denver, Co

Indy Car Mechanic

- Engine and Chassis specialist for IRL team.
- Tire Changer during pit stops.

1987-1998 **Various Manufactures** State of Colorado

Cabinet Maker / Shop Forman

- Various Positions in the cabinet making industry from production to design and also sales.

1983-1986 **Coral Construction** Marathon, Fl

General Laborer

- Full service builder constructing custom built homes.
- Duties included concrete and framing work, electrical, and tile roof installation

1982-1986 **United States Cost Guard** Marathon, FL

Seaman – Boatswains Mate / EMT

- Duties included search & Rescue, Law enforcement, Drug interdiction

Education: **High School Diploma** Wheat Ridge High School Wheat Ridge, Co

All required courses taken

EMT Certification Navel Air Station Jacksonville, FL

APPENDIX B
INFORMATION AND DOCUMENTS REVIEWED AND
RELIED UPON

United States Patent Number 6,357,193 B1 with related file history

Opening Report of Philip D. Dregger Concerning U.S. Patent 6,357,193 B1 (with appendices)

United Kingdom Patent No. GB2062056

United States Patent Number 5,471,801

United States Patent Number 5,304,095